SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FICUS INVESTMENTS, INC. and PRIVATE CAPITAL GROUP, LLC, *Plaintiffs,* *-against-* PRIVATE CAPITAL MANAGEMENT, LLC, THOMAS B. DONOVAN, GERARD M. BAMBRICK, ESQ., BAMBRICK & RYAN, P.C., CHRISTOPHER CHALAVOUTIS, CHALAVOUTIS & CO. CPA'S PC, VIRGINA DONOVAN, PAMELA DONOVAN, MICHAEL BODE, ESQ., SCOTT BURGWIN, ALISSA GLADSTONE, PETER KAMRAN, JOHN KILEY, FIRST REO CORP., KIRBY ENTERPRISES I CORP., LANDPORT EQUITIES LTC REALTY CORP., M&O ENTERPRISES, PGA EQUITIES, PLAZA EQUITIES, PLAZA INVESTMENTS, PRIVATE CAPITAL CORP., PRIVATE CAPITAL SERVICING CORP., PRIVATE LENDER SERVICES CORP., PRIVATE LENDER WAREHOUSE CORP., PRIVATE CAPITAL MANAGEMENT GROUP OF NY LLC, DONOVAN FAMILY TR LLC, OCFF LLC, CARTER STREET HOLDING CORP., LUCY DIGIACOMO, GNOSIS LLC, GNOSIS IV LLC, JEN DEVELOPMENT I CORP., NPL PORTFOLIO CORP., NPL OPTION ACQUISITIONS LLCAND JOHN DOES 1-10 *Defendants.* THOMAS B. DONOVAN individually and derivatively on behalf of PRIVATE CAPITAL GROUP, LLC, PRIVATE CAPITAL MANAGEMENT LLC and PRIVATE CAPITAL MANAGEMENT CORP. *Counterclaim Plaintiffs,* *-against-* FICUS INVESTMENTS, INC. and PRIVATE CAPITAL GROUP, LLC, *Counterclaim Defendants.* *-against-*	**Index No.: 600926/07** **REPLY AFFIRMATION OF RICHARD DOLAN**

PRIVATE CAPITAL GROUP, LLC, PRIVATE CAPITAL MANAGEMENT, LLC and PRIVATE CAPITAL MANAGEMENT CORP., *Nominal Defendants.* THOMAS B. DONOVAN individually and derivatively on behalf of PRIVATE CAPITAL GROUP, LLC, PRIVATE CAPITAL MANAGEMENT LLC, PRIVATE CAPITAL MANAGEMENT CORP. and PRIVATE CAPITAL MANAGEMENT GROUP OF NY, LLC *Third-Party Plaintiffs*, *-against-* JOSEPH C. LEWIS, JEFFERSON R. VOSS, TYLER V. PIERCY, THOMAS B. YOUTH, LAWRENCE A. CLINE, GERARD BAMBRICK, JEROME Z. CLINE, ROUNDPOINT MORTGAGE CO. and PETER SCHANCUPP, *Third-Party Defendants.* *-and-* PRIVATE CAPITAL MANAGEMENT, LLC and PRIVATE CAPITAL MANAGEMENT CORP., *Nominal Defendants.*	

RICHARD H. DOLAN, an attorney duly admitted to the courts of this state, affirms under penalty of perjury, the following to be true:

1. I am a member of Schlam Stone & Dolan LLP ("SSD"), counsel to Defendant Thomas B. Donovan ("Donovan") in this action. I submit this reply affirmation in further support of Donovan's motion for an order pursuant to CPLR § 4403: (a) rejecting the Amended Report of Special Referee Marilyn Dershowitz dated July 7, 2009 (the "Report"), to the extent that it disallowed the legal fees and disbursements ("Expenses") demanded by Donovan for the period

January 1, 2008 through January 31, 2009, as beyond the scope of the advancement provisions of the Operating Agreement (the "Operating Agreement") of Plaintiff Private Capital Group, LLC (the "Company"); and (b) modifying the Report to require that the Company advance the requested Expenses, plus interest from the date of Donovan's initial demands, within ten calendar days of the Court's order resolving this motion. I also submit this affirmation in opposition to the Company's cross-motion to confirm the Report in its entirety. Unless otherwise specified, the matters set forth herein are based upon my personal knowledge. Capitalized terms have the meanings given to them in the Operating Agreement.

ARGUMENT

2. I note that there is no dispute between us and the Company that the issue before the Court is purely one of contract interpretation. Neither the Company nor Donovan has ever claimed that the Operating Agreement is ambiguous. Neither side has ever offered any parol evidence relating to the Operating Agreement or its negotiation, drafting or construction.

3. Donovan's position is that the Operating Agreement, as interpreted by this Court and the First Department, required the Referee to make a two-step inquiry in determining whether a given Expense in Donovan's advances demands was subject to advancement: (i) was the Expense incurred as part of Donovan's defense in this action (*i.e.*, was the Expense incurred in this action as opposed to some other action, such as the Copperfield bankruptcy, and was the Expense incurred in defending the claims brought against him by Plaintiffs in this action as opposed to being incurred solely in furtherance of Donovan's counterclaims or third-party claims in this action); and (ii) and was the Expense reasonable (*i.e.*, were the hours billed and the rates charged reasonable)? The Company sought to add a third inquiry that finds no support in the Operating Agreement or the decisions from this Court or the First Department: (iii) was the Expense "incurred as a result of Donovan's being a party to this action <u>because he was an Officer of the Company</u>?" (Carpenito

Aff. ¶ 18.)

4. Both this Court and the Appellate Division already have determined that Donovan is entitled to advances because he was sued in this case because he was an office of the Company. In *Ficus Investments, Inc. v. Private Capital Mgmt., LLC*, 61 A.D.3d 1, 872 N.Y.S.2d 93 (1st Dep't 2009) ("*Ficus I*"), the Appellate Division reviewed in detail the relevant portions of the Operating Agreement giving rise to Donovan's right to advancement. As the Appellate Division noted, that right arises from Section 3.4.3(a) of the Operating Agreement: "The Company must, before final disposition of a Proceeding, advance funds to pay or reimburse the reasonable Expenses incurred by a Person who is a Party to a Proceeding because he or she is a Member, Manager or Officer" if two conditions were met, both of which both the Appellate Division and this Court found had been satisfied.

5. The capitalized terms in Section 3.4.3(a) are all defined in the Agreement. Section 3.4.1(d) defines "Expenses" as "all reasonable counsel fees, court costs, transcript costs, fees of experts, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, delivery service fees, and all other disbursements or expenses of the types customarily incurred in connection with prosecuting, defending, preparing to prosecute or defend, investigation, being or preparing to be a witness in, or otherwise participating in, a Proceeding, including any appeals." Section 3.4.1(f) defines "Party" as "an individual who was, is, or is threatened to be made a named defendant or respondent in a Proceeding," while Section 3.4.1(g) defines "Proceeding" as "any threatened, pending, or completed action, suit, or Proceeding, whether civil, criminal, administrative, arbitrative or investigative and whether formal or informal."

6. In addition, Section 3.4.5(b) requires the Company to pay Donovan's "reasonable Expenses to obtain court-ordered . . . advance for Expenses" once the Court has determined that he is entitled to advancement of his Expenses.

7. In *Ficus I,* the Appellate Division construed Section 3.4.3(a) and held that "[s]ince Donovan has satisfied the requirements under the Operating Agreement, Supreme Court properly determined that he is entitled to advancement of his expenses." *Ficus I,* 61 A.D.3d at 10, 872 N.Y.S.2d at 100.

8. In the proceedings before the Referee, the Company sought to add an additional condition to Donovan's entitlement to advances: according to the Company (and its expert, Mr. Hopkins), Donovan was required to show that the subject matter of each particular motion, hearing, discovery demand or proceeding and the like related specifically to Donovan's status as an officer of the Company before he would be entitled to obtain advances with respect to it. **Nowhere** in the Operating Agreement or the decisions from this Court or the First Department is there any such requirement.

9. For example, the Operating Agreement requires only that Donovan be a party to a "Proceeding"—*i.e.,* the "action [or] suit"—because he was an officer of the Company. As noted above, that determination has already been made by this Court and the Appellate Division. Once that determination was made, moreover, Mr. Donovan's status as an officer of the Company had no further relevance under the Operating Agreement. The Agreement's use of the word "Party" along with that term's express definition in Section 3.4.1 underscores the Company's error. While it is normal to speak of a "party" to an action, that term simply does not apply to the myriad motions, discovery demands and the like that occur in every civil action.

10. Thus, once the determination was made that Donovan is a party to this Proceeding because he was an Officer of the Company—a finding made by this Court in the Advances Order and the First Department in *Ficus I*—the only question for determination by the Referee was whether the Expenses for which Donovan is seeking advancement were reasonable and were incurred in his defense of this action.

11. Here, as before, the Company is attempting to deny or limit Donovan's right to the mandatory advancement of his Expenses by inventing new conditions to his contractual right to advances. In prior proceedings, for example, the Company argued unsuccessfully that: (a) Donovan is not entitled to advancement of any of his Expenses in this action because he was the subject of preliminary injunctive relief in favor of the Company; (b) Donovan is not entitled to advancement of any of his Expenses in this action because he had paid his attorneys with money that was allegedly stolen from the Company and thus supposedly already received the advances he was seeking; and (c) Donovan is not entitled to advancement for any Expenses for services that also benefitted another defendant not entitled to advances, even though the same Expenses would have been incurred if Donovan had been the only defendant in this action. The Company's argument that Donovan can receive advances only for Expenses on motions and the like specifically relating to his status as a former officer of the Company is thus just another in a long line of arguments having no basis in the Operating Agreement or the decisions of this Court or the First Department.

12. The Company also argues (Carpenito Aff. ¶ 19) that its new condition is supported by this Court's April 2008 Advances Order directing the Referee to make a determination as to which of Donovan's Expenses were "incurred as a result of Donovan's being 'a Party to a Proceeding because [he] . . . is a[n] . . . Officer.'" According to the Company, such an inquiry would have been "entirely unnecessary and a waste of the parties' time, money, and the judiciary's resources" if the new condition for which the Company is advocating were not required.

13. The Company's argument fails for many reasons. **First**, as the April 2008 Advances Order shows on its face, this Court was quoting the relevant provision in the Operating Agreement (Section 3.4.3(a)), not creating new conditions to Donovan's contractual right to receive advances. **Second**, in opposing Donovan's initial motion for advances, the Company pointed out that some of the time entries on the bills by Donovan's attorneys related to Expenses incurred in the Copperfield

bankruptcy, and the Donovan Books and Records Action, as well as Expenses incurred solely in connection with prosecuting Donovan's third-party claims and counterclaims in this action. Thus, the direction in the April 2008 Advances Order that the Referee was to determine which Expenses were incurred as a result of Donovan's being a party to this action because he was an officer was not superfluous. Nor was it inconsistent—as the Company argues (*id.*)—that Donovan stipulated prior to the 2008 advances hearings that Expenses incurred in the Copperfield bankruptcy, and the Donovan Books and Records Action, as well as Expenses incurred solely in connection with prosecuting Donovan's third-party claims and counterclaims in this action, were excluded from his then-pending demand for advances.

14. The Company next argues (*id.* ¶ 21) that its new condition was mandated by this Court's February 19 Order requiring Donovan to resubmit his advances demands without the use of block billing. In that Order, this Court made reference to "whether or note the hours billed are reasonable or reasonably related to work necessitated by virtue of Donovan being an officer of [the Company]." According to the Company (*id.*), the Court "plainly determined that the Operating Agreement's advancement provisions require advanceable Expenses to have a connection to Donovan's status as an Officer of the Company" and any other interpretation would mean that the "resubmission of Schlam Stone['s] bills [with more detail] was a complete waste of Schlam Stone's time, counsel's time, the Referee's time, and the Court's time." The February 19 Order meant no such thing. The Court required Schlam Stone to resubmit its bills in response to the Company's complaint that it could not tell how much time was spent on particular matters, or in some cases to identify the particular matters to which a particular time entry related. Nothing in the February 19 Order supports the Company's contention now that the Court was really rewriting the Operating Agreement to add a new condition not found in Section 3.4.3(a).

15. Moreover, while the Company claims that Donovan's position on this motion is at odds with his prior litigation positions in this action, it is actually the Company's argument for a new condition that represents a change in position. Specifically, the Company never contended that Section 3.4.3(a) required Donovan to show that the subject matter of each motion, hearing or discovery demand had to relate to his status as an officer of the Company when the parties were (i) litigating the motion that led to this Court's April 2008 Advances Order, (ii) briefing the appeal from that Order, (iii) conducting the hearing before the Referee in June and July 2008 that culminated in her November 2008 Report, (iv) litigating the confirmation of the Referee's November 2008 Report, or (v) litigating the appeal from this Court's January 26, 2009 Order confirming that Report. Indeed, the Company's fixation with the Court's "necessitated" clause in its February 19 Order was never even mentioned in Hopkins' Report and instead was raised for the first time at the March 2009 hearing before the Referee.

16. The Company argues that its new condition is supported by Delaware case law. That argument fails for two reasons: (i) the real issue is whether the new condition is supported by the Operating Agreement, which controls; and (ii) in all events, the Company distorts the Delaware cases it relies on in support of its new condition.

17. As the Appellate Division (like this Court) held in *Ficus I,* Donovan's right to receive advances arises from the Company's Operating Agreement rather than any principle of Delaware law. While the Delaware courts have dealt with similar issues far more frequently than the courts of other jurisdictions (and the Delaware decisions actually support Donovan's position on this motion) and thus their decisions are persuasive authority, the fact remains that Donovan's right to advances ultimately turns, not on Delaware case law, but instead on the terms of the Operating Agreement. Thus, the Company would have to show that the Operating Agreement imposes the new condition it convinced the Referee to apply. Yet it does not even attempt to do so, nor could it.

18. There is nothing in the Company's Operating Agreement that supports the Company's new condition. As quoted above, the Operating Agreement requires advancement of *all* reasonable litigation expenses incurred by a former officer who is a party to a Proceeding because he or she is a former officer of the Company, without qualification or limitation. In *Ficus I,* this Court and the Appellate Division found that Donovan has satisfied those conditions.

19. The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, *see, e.g., Slatt v. Slatt*, 64 N.Y.2d 966, 967, 488 N.Y.S.2d 645, 646 (1985), and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing," *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018, 584 N.Y.S.2d 424, 425 (1992). A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties. *Teichman v. Community Hosp. of W. Suffolk*, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474 (1996); *Morlee Sales Corp. v. Manfrs. Trust Co.,* 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 518 (1961). In construing any contract, the court examines the "entire contract and considers the relation of the parties and the circumstances under which it was executed," with its terms to be read "in the light of the obligation as a whole and the intention of the parties as manifested thereby." *Kass v. Kass*, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356-57 (1998).

20. In *Ficus I,* the Appellate Division noted that, while the Operating Agreement is governed by Florida law, the rule in Florida is the same as in New York: "the agreement [must] be read as a whole to determine its meaning, rather than as isolated sections or paragraphs." *Id.,* 61 A.D.3d at 8-9, 872 N.Y.S.2d at 99. As that Court also explained in *Ficus I,* the purpose of the advancement provisions in the Operating Agreement were, quite plainly, to provide Donovan with "immediate interim relief from the personal out-of-pocket expenses inevitably involved with investigations and legal proceedings." *Id.* (internal quotation marks omitted). In reaching that

conclusion, the Appellate Division cited and relied upon Delaware case law as persuasive authority to explain the provisions in the Operating Agreement, and particularly the Agreement's differing treatment of "indemnification" and "advances."

21. In short, Delaware case law is persuasive to the extent it explains the distinctions drawn by the Operating Agreement, such as the difference between "indemnification" and "advances." But Delaware case law cannot be used to add new conditions not found in the Operating Agreement, as the Company tries to do here. Thus, unless the Operating Agreement imposed the new condition that the Company seeks to apply, it would make no difference whether Delaware case law did so or not.

22. In all events, the Delaware cases do not support the Company's position. For example, in *Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 160 (Del. Ch. Ct. 2003), the Chancery Court held that the former officer was entitled to advancement of Expenses only relating to claims brought against him in connection with his duties as an officer of his company, and not relating to claims brought against him as an agent of his company. (He was an officer and an attorney who engaged in both conduct as an officer and as an attorney for the company.) Thus, the Chancery Court explained, the former office was not "entitled to have *all* of his expenses advanced if he merely proves that some portion of the case against him is subject to a contractual right of advancement." *Id.* at 175. There was never an argument made to the Chancery Court or a decision by the Chancery Court, however, about whether the officer's right to receive advances required him to show that the subject matter of a particular motion, hearing or discovery demand related specifically to the defendant's former status as an officer of the company. Where the defendant there was sued in two capacities, *i.e.,* both as a former officer and as the former attorney for the company, only the services related to the claims against which he had to defend because he was a former officer were subject to advances. Indeed, the Chancery Court went on to hold that it would

rely on the good faith submissions of the former officer's attorneys in determining whether a given Expense related to his defense against the part of the case against him as an officer rather than the part of the case against him as the former attorney.

23. Here, in contrast, the only reason Donovan is a defendant is that he was the former Chief Executive Officer of the Company. Unlike the officer in *Fasciana,* he never had a dual status. And, unlike *Fasciana,* the Referee here relied on the good faith submission of the Company's "expert" who had no personal knowledge of the Expenses incurred by Donovan.

24. Another Delaware case cited by the Company—*Radiancy, Inc. v. Azar*, 2006 WL 224059 (Del. Ch. Ct. Jan. 23, 2006)—is also mischaracterized by the Company. There, the Chancery Court held that the officers and directors there were not entitled to advances for services relating solely to their two counterclaims rather than their defense against the claims alleged against them. *Id.* at *4. But like its decision in *Fasciana*, the Chancery Court spoke in terms of claims and counterclaims and not individual motions or discovery devices. Moreover, the Chancery Court applied the "rule of inclusion" discussed in our moving papers in ruling that "to the extent that the issues involved in [the excluded counterclaims] mirror[ed] the allegations in plaintiff's complaint [that were subject to advancement], those issues [were] subject to advancement." *Id.*

25. The next Delaware case cited by the Company—*Underbrink v. Warrior Energy Services Corp.*, 2006 WL 2262316 (Del. Ch. Ct. May 30, 2008)—is also mischaracterized by the Company. Once again, the former officers' entitlement to advances was decided by the Chancery Court based on the nature of the claims asserted against them and not based on whether a motion or discovery was necessitated by their having been former officers of the company. Thus, advances were denied for "claims related solely to their positions within [certain] [p]artnerships." *Id.* at *16. The Chancery Court's *ratio decidendi* could not be clearer on this point:

> The 2006 Bylaws mandate advancement of expenses incurred in any **proceeding** that may give rise to a right to indemnification. [The former directors] contend they

> ought to be advanced all of their expenses in defending themselves in the Texas **Proceeding**, even those incurred by them in defending **claims** which are not made by reason of their status as [former] directors. [The company] replies that the advancement of expenses for defending **claims** unrelated to [the former directors'] status as directors would be unreasonable. I agree. . . . In seeking advancement for expenses related to the defense of **claims** not brought by reason of the fact they were directors of [the company], [the former directors] are asking for advancement of expenses for which indemnification is not possible.

Id. (emphasis added and footnote omitted). Once again, with respect to which Expenses related to advanceable versus non-advanceable claims, the Chancery Court decided to defer to the good faith estimates of the former directors' counsel, *id.* at *17, and not to the good faith estimate's of an "expert" retained by the Company.

26. Furthermore, the Company's attempts (Carpenito Aff. ¶ 30) to distinguish two cases relied on by Donovan in his moving papers—*Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992), and *Kreinberg v. Dow Chemical Co.*, 2008 WL 868108 (Del. Ch. Ct. Mar. 28, 2008)—fall flat. Both decisions speak of advances for mandatory and permissive counterclaims in terms of claims and not individual motions or discovery devices. Indeed, it is worth noting that every case that the Company has relied on in attempting to oppose or limit Donovan's advances rights—e.g., *Turkey Creek Master Owners Ass'n v. Hope,* 766 So. 2d 1245 (Fla. Dist. Ct. App. 2000) (*per curiam*); *Schoon v. Troy Corp.*, 948 A.2d 1157 (Del. Ch. Ct. 2008); *Valeant Pharmaceuticals Int'l v. Jerney*, 921 A.2d 732 (Del. Ch. Ct.), *appeal dismissed*, 929 A.2d 784 (Del. 2007), has been rejected by this Court and the First Department as not standing for the propositions put forth by the Company.

27. The Company attempts to bolster the Referee's erroneous legal conclusions and interpretations of the Company's Operating Agreement by relying on Mr. Hopkins' "expert" testimony and by characterizing the Referee's conclusions and Mr. Hopkins' testimony as "factual." These attempts blink reality.

28. **First**, it could not be clearer that Hopkins was interpreting the Operating Agreement, notwithstanding the Company's erroneous claim (Carpenito Aff. ¶ 32) that Donovan failed to cite to any references to his doing so. Those references are legion in my July 24, 2009 Affirmation. *See, e.g.,* Dolan July 24, 2009 Affirm. ¶¶ 44 (citing Hopkins Report ¶ 77 (Expenses relating to books and record contempt hearing "not within the terms of the advancement provision of the . . . Operating Agreement.")), 46 (citing Hopkins Report ¶ 95 (Expenses relating to Cline e-mail hearing were "not within the terms of the advancement provision of the . . . Operating Agreement")), 49 (citing Hopkins Report ¶ 120 (Expenses relating to advances emergency motions were "not subject to advancement under the . . . Operating Agreement")), 54 (citing Hopkins Report ¶ 123 (Expenses relating to superiority of Schlam Stone's charging lien were "not available under the . . . Operating Agreement")), 55 (Hopkins Report ¶ 112 (Expenses relation to Schancupp subpoena were "not within the terms of the advancement provision of the . . . Operating Agreement")), 55 (Hopkins Report ¶ 80 (Expenses relating to Ravage subpoena did "not fall within the advancement clause of the Operating Agreement")), 55 (Hopkins Report ¶ 98 (same quote regarding Greenberg Traurig subpoena). If the Company is conceding that Hopkins' could not opine about questions of contract interpretation or provide legal opinions and that it was impermissible for the Referee to rely on such opinions and interpretations to support her own legal interpretations of the Operating Agreement, Donovan is prepared to accept that concession.

29. **Second**, to the extent the Company is claiming that Hopkins was providing factual testimony, "[a]n expert may not speculate nor guess and [i]t is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness." *Gomez v. New York City Housing Auth.,* 217 A.D.2d 110, 117, 636 N.Y.S.2d 276 (1st Dep't 1995). Here, there is no dispute that Hopkins lacked personal knowledge of the negotiating history of the Operating Agreement and what specific tasks Schlam Stone performed in support of the Expenses it

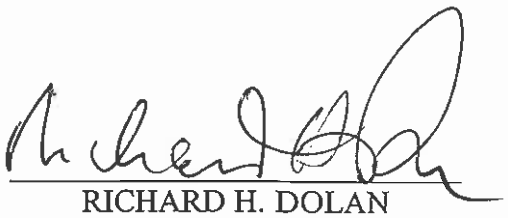
for which it was demanding advances. Thus, any factual testimony about whether specific Expenses were advanceable under the terms of the Operating Agreement could not properly be offered by him.

30. In the remainder of its papers (Carpenito Affirm. ¶¶ 34-50), the Company does not disagree with Donovan that, with respect to the categories of Expenses that the Referee found were not subject to advancement, these Expenses were incurred by Donovan while he was a party to this action, in connection with claims brought against him in this action, and this action was brought against him as a result of his having been an officer of the Company. And Donovan does not dispute the Company's argument that the substance of the motions and hearings related to activities undertaken by Donovan after he was no longer an officer of the Company and that these Expenses related in part to his defenses to the Company's claims and in part to his counterclaims and third-party claims in this action. The issue that has been joined by the parties is whether these Expenses are advanceable under the Operating Agreement and the decisions of this Court and the First Department. Without repeating the analysis in my July 24, 2009 affirmation with respect to each of these categories, suffice it to say here that, for the reasons stated above and in my July 24 affirmation, we respectfully submit that they are. Indeed, with respect to the arbitrary 45/55 allocation made by the Referee with respect to discovery-related Expenses, it is impossible to reconcile (a) the Referee's decision not to credit any of the deductions proposed by the Company with respect to Expenses relating to Donovan's counterclaims and third-party claims (no doubt because those Expenses also related to the defense of Plaintiffs' claims against Donovan) with (b) the Referee's decision to lop off 55% of Donovan's discovery-related Expenses based on Hopkins' arbitrary decision to allocate 55% of these Expenses solely to Donovan's counterclaims, third-party claims, or the Cline e-mail or books and records contempt hearings.

CONCLUSION

31. For the reasons set forth above, Donovan's motion to confirm in part, reject in part, and modify in part the Report should be granted.

Dated: New York, New York
September 4, 2009



RICHARD H. DOLAN